Supreme Court, U. S.
FILED
MAR 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1025

FATHER VINCENT LAROCCA, of Counsel to WILLIAM GALLAGHER, Attorney-In-Charge, The Legal Aid Society, Criminal Defense Division,

Petitioner,

against

HON. MORGAN LANE, Judge of the Criminal Court of the City of New York,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3394

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1025

FATHER VINCENT LAROCCA, of Counsel to WILLIAM GALLAGHER, Attorney-In-Charge, The Legal Aid Society, Criminal Defense Division,

Petitioner,

against

HON. MORGAN LANE, Judge of the Criminal Court of the City of New York,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the New York Court of Appeals is reported at 37 N Y 2d 575, 338 N.E. 2d 606 and 376 N.Y.S. 2d 93; it is reproduced as Appendix A to the petition. The opinion of the Appellate Division of the Supreme Court, Second Department is reported at 47 A D 2d 243 and 366 N.Y.S. 2d 456; it is reproduced as Appendix B to the petition. The opinion of the Supreme Court, Kings County is reported at 77 Misc 2d 123 and 353 N.Y.S. 2d 867; it is reproduced as Appendix C to the petition.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on October 23, 1975. The petition for certiorari was filed on January 19, 1976. Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

Questions Presented

1. May a state judge, in the exercise of his discretion for the purpose of insuring a fair trial, prevent an assigned defense counsel who is also a clergyman from representing his client before a jury while wearing clerical dress?

2. Is a criminal defendant, represented by a public defender organization by assignment of the court, entitled, as a matter of constitutional right, to be represented by a particular attorney in that office?

Constitutional Provisions Involved

The Constitution of the United States provides in pertinent part:

> Amendment I: "Congress shall make no law respecting the * * * free exercise [of religion]."
>
> Amendment VI: "In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defense."
>
> Amendment XIV: "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *".

Statement of the Case

Petitioner, an ordained Roman Catholic priest for approximately twenty-five years, was admitted to the New York bar in 1973. Employed by the Legal Aid Society in its Criminal Defense Division, petitioner was assigned to represent one Cecelia Daniels, accused in the Criminal Court of the City of New York, Kings County, of assaulting her child's school teacher (A2).* The charge, a Class A misdemeanor, carrying a maximum penalty of one-year's imprisonment, N.Y. Penal Law §§ 70.15(1), 120, was thus triable by a jury, *Baldwin* v. *New York*, 399 U.S. 66 (1970).

On January 7, 1974, the case was about to be tried before respondent and a jury when the assistant district attorney objected to proceeding while petitioner was wearing clerical dress. The prosecutor urged that petitioner's clerical collar might prejudice a juror either in favor or against the defendant.

Petitioner contended that he was under instructions from his religious superiors to wear clerical dress; that he had always dressed in this manner throughout law school, before the Committee on Character and Fitness, at his admission to the bar and at all previous court appearances. Admittedly, the *Daniels* case was the first in which he was to appear before a jury, *ibid.*, and the record is silent as to whether petitioner ever consulted his bishop as to whether his instructions could be waived for such a contingency (A11-12). In any event, petitioner contended that it would be a denial of his right to free exercise of religion to be forced to appear other than in clerical dress as well as a denial of his client's right to be represented by counsel of her choice (A2-3).

---

* Numbers in parentheses preceded by capital letters refer to pages of the appendices to the petition.

Respondent nevertheless sustained the objection (A3, F2-4). In so doing he drew on his twenty years' experience as a criminal defense attorney in private practice, fourteen years as an assistant district attorney and nine years on the bench, for the most part sitting in the Criminal Court (F2).

Petitioner then instituted this proceeding pursuant to N.Y. Civil Practice Law & Rules, Article 78, to prohibit respondent from interfering with the manner of his dress. The Supreme Court, Kings County, granted his application (Pet. Appendix C). However, the Appellate Division reversed (Pet. Appendix B) and the Court of Appeals affirmed the Appellate Division (Pet. Appendix A), holding that neither petitioner's right to the free exercise of religion (A9-12) nor his client's right to counsel (A8) had been abridged.

Reasons for Denying the Writ

A.

The "free exercise" issue raised by this case is of limited practical significance. The number of active members of the bar who are also clergymen is obviously small. An even smaller number are (1) engaged in criminal defense and (2) would, even if permitted, appear as counsel before a jury in distinctive clerical dress. Thus, at the threshold, this case fails to present itself as one of general importance warranting the exercise of this Court's certiorari jurisdiction, S.Ct. Rules, Rule 19(1)(a).

Moreover, this case is moot. The judgment reviewed by the State appellate courts directed respondent to permit petitioner to appear before a jury in clerical dress in a particular case, viz., *People* v. *Cecelia Daniels*.* Re-

* The pertinent decretal provision reads as follows:

"ORDERED AND ADJUDGED that the respondent is prohibited from requiring petitioner to remove his clerical collar while

(footnote continued on following page)

spondent was and is a judge of the Civil Court of the City of New York, sitting in the Criminal Court by assignment of the Appellate Division, N.Y. Const., Art. VI, §§ 15, 26(g). Since the commencement of these proceedings, respondent has returned to duty in the Civil Court. When the *Daniels* case is finally tried (A3), respondent will not be sitting. Another unknown judge's attitude toward an attorney appearing in clerical dress is obviously speculative; equally so the likelihood of recurrence of this issue, *Golden* v. *Zwickler*, 394 U.S. 103, 109-110 (1969); cf. *Rosario* v. *Rockefeller*, 410 U.S. 752, 756, f.n. 5 (1973).

B.

Petitioner's claim that he is entitled, as a matter of free exercise of religion, to wear clerical dress while functioning as an attorney-at-law before a jury,** is entirely too insubstantial to warrant plenary review by this Court.

The First Amendment right to free exercise of religion is not absolute and may be restricted by the state, even if only upon a showing of a compelling state interest, *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972); see also: *Sherbert* v. *Verner*, 398 U.S. 402 (1963); *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946); *Prince* v. *Massachusetts*, 321 U.S. 158, 166-167 (1944) and *Reynolds* v. *United States*, 98 U.S. 145, 146 (1878).

New York's compelling interest in assuring a fair trial cannot be denied. The Court of Appeals articulated it

(footnote continued from preceding page)

acting as defense counsel in the jury trial of *People* v. *Cecelia Daniels*, Docket No. K-324146."

** This is the only First Amendment claim properly before the Court. From its inception, this case was treated by all parties and by all of the State courts as involving "free exercise", (A1, 8 et seq; B4-8, C1, D3, and F2). The issues of alleged "establishment of religion", pet. p. 10 and "freedom of expression" have been belatedly raised for the first time in the petition for certiorari, see *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955); *Beck* v. *Washington*, 369 U.S. 541, 549-553 (1962).

as follows:

> "Primary, of course, in a criminal action, is the right of both the defendant and the People to a fair and impartial trial. Indeed, a fair trial is a paramount constitutional condition in any judicial proceeding; it is the foundation of a criminal trial, if justice be its essence" (A9).

The Sixth and Fourteenth Amendment rights to a fair trial are of such importance that this Court has favored them over another First Amendment right: the right to freedom of the press, see e.g. *Shepherd* v. *Maxwell,* 384 U.S. 333, 356 et seq. (1966); *Estes* v. *Texas,* 381 U.S. 532, 539 (1965).

Moreover, as a member of the bar and as counsel for the defendant in this particular case, petitioner was subject to the disciplinary authority of the courts, *In re Griffiths,* 413 U.S. 717, 727 (1973). It is generally understood that the courts' authority over attorneys extends to dress and appearance to the extent necessary to maintain court decorum, *People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 473, 477; 162 N.E. 487, 489-490 (1928); *Matter of Peck* v. *Stone,* 32 A D 2d 506, 507-508, 304 N.Y.S. 2d 881, 884-885 (4th Dept. 1969); *Sandstrom* v. *State of Florida,* 390 S. 2d 17, 22 Fla. App. 1975). This Court in its instructions to counsel prescribes "conservative business dress" as the appropriate attire for attorneys appearing before it. Petitioner himself has cited, pet. p. 11, this Court's decision which holds that dress and appearance are a form of communication, *Tinker* v. *Des Moines School District,* 393 U.S. 503, 505 (1969).

Under the circumstances of this case, in view of the esteem in which the clergy are generally held (A10-11) and because a clergyman's character testimony or recommendation to courts and probation officers is often given (F2-3), respondent correctly concluded that petitioner's appearance as counsel for a defendant while in clerical dress might be taken by a juror as an improper assertion by counsel of his client's innocence, see A.B.A. Code of Prof. Resp., DR 7-106(c)(3)(4). A clerical collar stands out in a courtroom, and will make an impression upon a trier of the facts, even in a non-jury case, *People* v. *HST Meth, Inc.,* 74 Misc 2d 920, 921, 346 N.Y.S. 2d 146, 148 (Sup. Ct., N.Y. Co., 1973), affd. 43 A D 2d 932, 352 N.Y.S. 2d 487 (1st Dept., 1974). Cf. *People* v. *DeMore,* 45 Misc 2d 872, 258 N.Y.S. 2d 10 (App. Term, 2d Dept., 1965) like the instant case, a third degree assault charge in which the Court held:

> "it was an improvident exercise of discretion to permit a member of the clergy to sit alongside the complaining witness while the jury was being impanelled in this type of case when all other witnesses were excluded. It gave an air of credence and respectability to anything the complainant might thereafter say and was prejudicial to the defendants." 45 Misc 2d at 874, 258 N.Y.S. 2d at 12.

Respondent was entitled to employ an effective remedy in carrying out his responsibility to assure a fair trial, *Rosario* v. *Rockefeller, supra,* 410 U.S. at 762, fn. 10. His action was clearly secular in scope and in no way interfered with religious services or petitioner's freedom of belief, *Gillette* v. *United States,* 410 U.S. 437, 462 (1971). Thus, any interference with the free exercise of religion was minimal and necessary in the interest of justice, *Wisconsin* v. *Yoder, supra.*

C.

The claim of denial of effective assistance of counsel advanced by petitioner on behalf of his assigned client is frivolous.

The right of an indigent defendant to assigned counsel, *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972); *Gideon* v. *Wain-*

wright, 372 U.S. 335 (1963) does not include the right to dictate to the Court the choice of such counsel. The decisions of this Court reflect the understanding that where counsel is to be appointed, the choice lies within the prerogative of the court, *Crooker* v. *California,* 357 U.S. 433, 439 (1958); *Dennis* v. *United States,* 340 U.S. 887 (1950) FRANKFURTER, J., concurring. In rebuffing petitioner's argument that his assigned client was entitled to his particular services (A8), the Court of Appeals applied a rule followed throughout this country, both in the state and federal courts, *People* v. *Brabson,* 9 N Y 2d 173, 180-181; 173 N.E. 2d 227, 231; 212 N.Y.S. 2d 401, 407 (1961); cert. den. 369 U.S. 879 (1962); *United States ex rel. Baskerville* v. *Deegan,* 428 F. 2d 714, 716 (2d Cir.); cert. den. 400 U.S. 928 (1970); *United States* v. *Young,* 482 F. 2d 993, 995 (5th Cir. 1973).

It is conceded by petitioner, pet. p. 12, that if he were forced by his religious beliefs to withdraw as Mrs. Daniels' counsel, she would not remain unrepresented. Her attorneys of record are the Legal Aid Society, the largest public defender organization in the world, *People* v. *Wilkins,* 28 N Y 2d 53, 56; 268 N.E. 2d 756, 758; 320 N.Y.S. 2d 8, 11 (1971). Petitioner is not the only Legal Aid Society attorney who could offer Mrs. Daniels an effective defense.

Thus, no further review of this issue is necessary.

CONCLUSION

Certiorari should be denied.

Dated: New York, New York, February 27, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel